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No. 341

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In the Supreme Court of the United States

OCTOBER TERM, 1961

GEORGE HERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:

Abbott v. *United States*, 239 F. 2d 310	5
Stern v. *United States*, 204 F. 2d 647	5
United States v. *Giallo*, 206 F. 2d 207, affirmed, 346 U.S. 929	7

Statutes:

18 U.S.C. 2311	2
18 U.S.C. 2314	2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 289 F. 2d 362.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1961 (Pet. App. 16). A petition for rehearing was denied on June 21, 1961 (Pet. App. 17). On July 12, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari

to and including August 20, 1961, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in determining "market value" of stolen jewelry under 18 U.S.C. 2311 and 2314, the wholesale market value, rather than the cost of manufacture, was the proper standard.

2. Whether the trial judge improperly participated in the trial or otherwise acted improperly to petitioner's prejudice.

STATUTES INVOLVED

18 U.S.C. 2311:

> As used in this chapter:
>
> * * * *
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

18 U.S.C. 2314:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * *

STATEMENT

On May 19, 1958, at the railroad station in St. Louis, Missouri, a sample case of jewelry disappeared from a hand-truck where it had been left with a porter by Jack Heffron, president of a jewelry company (R. 198-204, 282, 313[1]). The following morning, petitioner, under an assumed name, shipped the case by railway express from Memphis, Tennessee, to a discount gift shop in Florida operated by two co-defendants (R. 473-487, 505-512, 561, 766-767).

At the trial before a jury, Heffron, who had been in the jewelry business for 16 years, testified that the fair wholesale market value of the jewelry was $7,500, based upon actual cost to his company in the amount of $5,897 (R. 197-198, 279-280, 413-414, 417, 420). Louis Posner, a jeweler of 35 years of experience, who customarily appraised this type of jewelry four or five times a year, testified that the fair wholesale market value of the jewelry was $7,938 (R. 289-290, 447-451, 459). Both witnesses testified that their appraisals of value were applicable as of the time of the transportation of the jewelry and that the value was the same in St. Louis, Memphis, and Ft. Lauderdale (R. 413-414, 447).

Two witnesses testified for the defense, stating the manufacturing cost to be $4,800 and $4,408.94, respectively (R. 743-744, 754-756).

The jury found petitioner guilty of transporting in interstate commerce stolen goods of a value in

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[1] The designation "R." refers to the printed transcript of the district court proceedings.

excess of $5,000, and of conspiracy (R. 1-3, 71), and acquitted the co-defendants of knowingly receiving such goods and of conspiracy (R. 2-3, 71-72). The court of appeals reversed petitioner's conviction on the conspiracy count (Pet. App. 12-13) but sustained his conviction on the substantive count of transporting the stolen goods (Pet. App. 5-10, 13-15).

ARGUMENT

1. Petitioner's argument that the requirement of a market value in excess of $5,000 was not met (Pet. 9-10) is without merit and represents an attempt to inject into this case issues not presented by the evidence. Heffron testified that the cost to his company was $5,897 and that the market value—the price to a willing buyer (including the normal 25% mark-up given to wholesalers)—was about $7500. An independent appraiser confirmed this market value. All that petitioner offered to counteract that figure (well in excess of $5000) was testimony based primarily on manufacturing costs, which came fairly close to the $5,000 standard (*i.e.*, $4800 and $4408). Certainly, market value—saleable value for items of general merchantability such as jewelry—cannot be figured on base manufacturing cost alone; something additional must be included, and any reasonable increment would necessarily bring the value of the goods above $5000. Thus, there is presented in this case none of the problems suggested by petitioner on the basis of factual situations in other cases—whether wholesale or retail price should be considered, how market value can be determined for an

item like an oil map of use only to a limited group (the situation in *Abbott* v. *United States*, 239 F. 2d 310 (C.A. 5), on which petitioner relies), or the consideration to be given to deterioration of used articles like furs (*Stern* v. *United States*, 204 F. 2d 647 (C.A. 6)).

2. Petitioner asserts generally that the trial judge participated unduly in the trial by interrogating witnesses, that the instructions were "over-bearing and lengthy," and that the judge's exoneration of bail was without basis, but apparently limits the questions he presents in this Court (Pet. 4) to the issue of undue participation.

As conceded by petitioner (Pet. 12), the entire record must be weighed in determining whether petitioner was deprived of a fair trial. The trial judge was confronted with problems in keeping this trial on a proper course, not only with respect to the presentation of proof by the Assistant United States Attorney, but also by certain conduct of defense counsel (see R. 439). The jury was clearly admonished that difficulties of this type were not to be related in any manner to the judgment of guilt or innocence; these admonitions appeared at numerous points throughout the trial and again, in unmistakable language, in the final instructions, as follows (R. 838-840):

> [S]ome counsel complained that I was asking too many questions, participating too much in the trial. I did it, as I said at the time, only in an attempt to expedite the matter at hand. I don't have any opinions in those matters and I don't have any opinion, any comment to make to you

and in view of that objection, of course, the reason they made the objection they felt that you might be influenced to think that I had some opinion about the guilt or innocence of these defendants and I don't have any such opinion. I didn't have it then and I say to you now I don't even have it now. * * *

* * * *

If you do not like the way the trial has been conducted in some respects, if you don't like the way the prosecution has acted or the defense attorneys have acted, that has nothing to do with the case. These defendants are not to be judged on that basis. They are to be judged by what the evidence produced shows. I say all that to urge you to know that I don't know any more about this case than you do. All I know about it is just what I have heard, like you have heard from the witness stand here. It is the duty of the attorneys on each side of the case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. * * *

The court of appeals below, after reviewing the whole record, stated (Pet. App. 6, 15):

To our minds, the record as a whole indicates that the trial judge participated in one way or another more actively than is customary, but with no bias or prejudice toward either side that would render the proceedings unfair. * * * [see also Pet. 5-6].

* * * *

We have examined the instructions of the judge. We do not find them overbearing and

> confusing and conflicting, as [petitioner] contends. * * * We have considered all of [petitioner's] contentions, whether discussed in this opinion or not, and have concluded that, except as to [the conspiracy count] there was no prejudicial error in the proceedings below. We hold that the trial was fairly and impartially conducted, and the evidence of guilt to support [the substantive count] was substantial. * * *

The record as a whole supports these conclusions. See *United States* v. *Giallo*, 206 F. 2d 207, 209 (C.A. 2), affirmed, 346 U.S. 929, in which the record, taken as a whole, demonstrated that the trial judge's active part in the trial was not an abuse of discretion.

CONCLUSION

The judgment below is a correct application of established principles to a particular factual situation. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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